also because TPW3 had satisfactorily explained his conclusions, the court held that no legal inference can be made on the facts as they stand upon a balance of probabilities that the third party was liable in negligence. Even DW2 could not categorically state that TPW3 had been wrong in his diagnosis. He had only opined that a CAT scan in Kuala Lumpur would have enabled the authority to manage the deceased better.

At the most, therefore, DW2's testimony remains a matter of opinion. There is no cogent evidence that TPW3 had departed from the approved practice in treating the deceased. TPW3 had been attending to the deceased throughout and had diagnosed the matter as a cerebral contusion where the recovery could take as long as 18 months. He had found it fit to discharge the deceased on both occasions being of the opinion that, in view of the progress of the deceased, nothing else could be done. He had even recommended institutional care for the deceased after the second discharge. Both the discharges had been followed with follow-up check-ups where the deceased was able to talk. In short, TPW3 had treated the deceased in the same way he had treated other patients in similar condition, which according to him were not that rare considering the five to ten such admissions daily. In the event, he had not sent the deceased for a CAT scan which he said was neither necessary nor beneficial.

In the circumstances, I would find the plaintiff 60% liable, the defendant 40% liable and the third party not liable for negligence. In the event, the court awards the plaintiff, on 100% liability, special damages of $1,136 with interest at 4% from the date of the accident to the date of judgment and general damages totalling $52,150 made up of $6,000 for loss of expectation of life, $31,150 for the lost years and $15,000 for pain and suffering and loss of amenities, with interest at 8%, except for the future loss, from the date of service of the writ to the date of judgment and costs. The defendant is to pay the costs of the third party. As usual, all costs are to be taxed accordingly.

Order accordingly.

Solicitors: *Mahmood Adam, Wan Ismail & Co; Matthew Thomas & Co.*

Reported by *Yap Shao Sin*

Sungei Way Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors

HIGH COURT (SIBU) — SUIT NO 33 OF 1985
CHONG SIEW FAI J
6 SEPTEMBER 1989

Civil Procedure — Consent judgment — Submission to judgment — Setting aside of judgment — Fraud, negligence and mutual mistake alleged

Civil Procedure — Execution — Stay — Action for order to set aside judgment — Special circumstances

A consent judgment was entered against the defendants in this action but subsequently they commenced Suit No 64 of 1986 against the plaintiff in which they sought an order to set aside the judgment. The defendants, except for the first defendant, applied for a stay of execution of the judgment pending the outcome of the trial of Suit No 64 of 1986 or until further order. The grounds of the application were that the judgment was obtained by (i) negligence, fraud or alternatively by negligent or fraudulent inducement on the part of the plaintiff, their servants or agents; and (ii) by mutual mistake on the part of the plaintiff and the defendants in the action.

It was contended for the defendants/applicants that they expected the first defendant company to pay the judgment sum and that entry of the judgment would be a mere formality which would enable the first defendant company to settle the claim. It was also contended that it was only when the plaintiff commenced execution proceedings against the defendants/applicants that it became clear to the defendants/applicants that submission to judgment involved themselves being personally liable for the judgment debt. It was alleged that it was the practice of the plaintiff to take judgment in such a manner and that the plaintiff agreed that 'the judgment will automatically lapse upon the updating of the account'. It was also contended for the defendants/applicants that there was a distinction between submitting to judgment and allowing judgment to be entered in terms as in this action. The defendants/applicants also alleged that they 'were supposedly to be guarantors' in respect of a lease agreement between the plaintiffs and a company named Grand Lumber Sdn Bhd but that the first defendants' name was substituted without the consent of the defendants/applicants.

Held, dismissing the application:

(1) It is, of course, true as a matter of law that in the compromise of an action, the forms and methods of compromise or settlement may, among others be: (a) an agreement to enter judgment by consent; and (b) an agreement for the defendant to submit to judgment. In the instant case, the parties had not only agreed to submit to judgment but also to have the consent judgment entered.

(2) The defendants/applicants, on the materials available, were clearly guarantors for the lease agreements entered into between the plaintiffs and the first defendants.

(3) A stay of execution of a judgment for payment of money will not ordinarily be granted simply on the ground that the defendants/applicants have brought an action to set aside the judgment, at any rate not in the absence of special circumstances rendering it inexpedient to enforce the judgment, though the bringing of the action is of course a factor to be considered together with other relevant facts and circumstances that are properly placed before the court.

(4) The defendants/applicants had also failed to show that there were special circumstances rendering it inexpedient to enforce judgment, it not being their case that they were unable from any cause to pay the judgment sum. On the other hand, a plaintiff who has properly obtained a judgment ought, generally speaking, not to be deprived of the fruit of his litigation except for good reason.

Case referred to

1 *Ferdinand Wagner* v *Laubscher Brothers & Co* [1970] 2 All ER 174 (folld)

Ting Sing Chuan for the defendants/applicants.
Belinda Hii (Miss) for the plaintiff/respondent.

Cur Adv Vult

Chong Siew Fai J: This is an application by the second, third, fourth, fifth and sixth defendants ('the applicants') for stay of execution by the plaintiff, Sungei Way Leasing Sdn Bhd ('Sungei Way'), on the consent judgment entered herein against them and the first defendant ('limited company') on 29 July 1985 pending the outcome of the trial of the Suit No 64 of 1986 brought by the six defendants above-mentioned against Sungei Way to set aside the said consent judgment or until further order.

The grounds for this application are that the said consent judgment was obtained (i) 'by negligence, fraud; alternatively by negligent or fraudulent inducement on the part of' Sungei Way, its servants or agents; and (ii) 'by mutual mistake on the part of' Sungei Way and the defendants in this action.

So far as are relevant, the facts of the case may be briefly stated as follows. On 8 April 1985 Sungei Way instituted this action claiming $2,306,108.70, interest and costs being the amount due and payable because of default in the payment of agreed rentals under six lease agreements relating to the leasing of Caterpillar tractors, logging trucks and other equipments. The limited company was sued as the lessee, and the five applicants in this application were sued as the guarantors under two letters of guarantee. A joint defence of all the six defendants dated 22 April 1985 was filed by their then advocates Teo & Co.

By a summons in chambers dated 12 June 1985, Sungei Way through its advocates, Lau & Co, applied under O 18 r 19 to strike out the defence and for entry of judgment in the sum and interest as claimed. At the hearing of the application on 29 July 1985 in which both sides were represented by advocates, consent judgment was entered against all the six defendants in the sum claimed, interest and costs at $300.

Subsequently, there was a change of advocates by the defendants. On 13 September 1988 the applicants (ie the second, third, fourth, fifth and sixth defendants) through Yong & Wong filed this application. Altogether there are eight affidavits:

(1) Teo Chong Lee's affidavit affirmed on 5 September 1988.
(2) Second defendant Ho Boon Hong's affidavit affirmed on 9 September 1988 ('Ho's first affidavit').
(3) How Pak Kong's affidavit made on 6 October 1988 containing ten paragraphs ('How's first affidavit').
(4) How Pak Kong's affidavit made on 6 October 1988 containing eight paragraphs ('How's second affidavit').
(5) Sixth defendant Wong Yuk Hung's affidavit made on 2 December 1988 ('Wong's affidavit').
(6) Second defendant Ho Boon Hong's affidavit made on 2 December 1988 ('Ho's second affidavit').
(7) How Pak Kong's affidavit made on 16 December 1988 ('How's third affidavit').
(8) William Lau Kung Hui's affidavit made on 20 February 1989.

Affidavits (1), (2), (5) and (6) were filed on behalf of the five defendants/applicants and affidavits (3), (4), (7) and (8) on behalf of the plaintiff/respondent. The contents of affidavits (2) and (5) are substantially the same; so are affidavits (3) and (7).

Before going further, I would say at once that the fourth defendant, Loi Teck Ee, had not made any affidavit himself nor were any of the affidavits filed on behalf of the applicants made on his behalf. So far as concerning him, therefore, no affidavit was filed in support of his application.

I wish also to make clear that the opinions and comments I express in this judgment are based on the evidence and materials before me in this application and for the purpose of this application. They do not decide and must not be taken as adjudicating or intending to adjudicate the issues in the said suit No 64 of 1986.

As stated earlier, one of the grounds of the application is that the judgment was obtained by negligence or fraud or alternatively, by negligent or fraudulent inducement on the part of Sungei Way, its servants or agents. In the affidavits filed in support of the application, however, only How was alleged. Hence, it is necessary to examine the allegations made against How. This I propose to do shortly and also when dealing with submissions by counsel.

For the applicants, it was submitted that the grounds of the application are contained, in substance, in Mr Teo Chong Lee's affidavit. My attention was drawn to paras 4, 5, 6, 7 and 8, particularly para 5 thereof. Mr Teo's legal firm, Teo & Co, was then acting for all the defendants. Briefly, what Mr Teo deposed in those five paragraphs were these:

(a) that a few days before 19 June 1985, the second and fifth defendants and How Pak Kong (manager of the plaintiff, Sungei Way) told him in his office that 'the

parties had agreed to settle the action and that as a step towards settlement, the defendants should have submitted to judgment first so that other terms for the settlement could be worked out subsequently';

(b) that Mr Teo told the defendants to write to his firm confirming their intention to submit to judgment;

(c) that subsequently he received a letter dated 19 June 1985 (exh 'TCL 1') signed by the five defendants/applicants instructing his firm to submit to judgment; and

(d) that on or about 23 July 1985 his firm received a letter dated 16 July 1985 (exh 'TCL 2') from Lau & Co (advocates for the plaintiff) in which there was a reconfirmation that the plaintiff and the defendants (to quote Mr Teo's exact words) 'had agreed to settlement subject to certain mutual arrangements to be effected thereon'.

Now pausing here, I would make some observations:

(1) The original of exh 'TCL 2' is a letter from Lau & Co addressed to the senior assistant registrar, High Court, Sibu with copies extended to, among others, Teo & Co. So it would be more accurate to say that Teo & Co received a copy of that letter.

(2) So far as is relevant and concerning the court registry, exh 'TCL 2' requested for an earlier date to hear the plaintiff's application instead of on the originally fixed date of 14 October 1985 on the ground that the defendants had agreed to submit to judgment.

(3) In interpreting the letter exh 'TCL 2' from Lau & Co, Mr Teo said the plaintiff and the defendants in this action had agreed to settlement 'subject to certain mutual arrangement to be effected thereon'. (See para 8 of Mr Teo's affidavit.) With respect, this, in my opinion, is not quite in consonance with exh 'TCL 2'. What Lau & Co wrote in exh 'TCL 2' was: 'This will enable our clients, the plaintiffs and the defendants to tie up and complete certain mutual arrangements which shall depend on the above judgment to be entered.'

Reading the above passage, it appears clear, to my mind, that the 'certain mutual arrangements', whatever those might be, would be dependent on the entry of the judgment.

Furthermore, in para 5 of his affidavit, Mr Teo said that the second and fifth defendants informed him that the parties had agreed to settle the action out of court and that as a step towards settlement, the defendants should have submitted to judgment first so that other terms for the settlement could be worked out subsequently. This finds support in para 5 of Ho's first affidavit and para 5 of Wong's affidavit (which was also made on behalf of the third and fifth defendants) that the second and fifth defendants had sometime in mid-June 1985 informed Mr Teo that they were 'prepared to submit to judgment so as to give way to a settlement out of court'. It is clear that whatever the settlement might be, they were prepared to submit to judgment in order to pave the way for the settlement.

It is not in dispute that the letter dated 19 June 1985, exh 'TCL 1', was from the five applicants to their then advocates Teo & Co. The content of the letter is short and clear. It reads:

> M/s Teo & Co Advocates
> No 18, Kampung Nyabor Road
> Sibu
>
> Dear Sirs
>
> Re: Suit No 33 of 1985
> Sungai Way Leasing Sdn Bhd v Kim Leong Sdn Bhd & Ors
>
> We refer to the above.
>
> We hereby confirm our verbal conversation that we wish you to withdraw the defence that you have filed on our behalf and to submit to judgment accordingly.
>
> Kindly please contact M/s Lau & Co Advocates, Sibu.
>
> Yours faithfully
> Kim Leong Timber Sdn Bhd
>
> Loi Teck Ee (signed) Ho Boon Hong (signed)
> Foong Hoi Too (signed) Ngui Ngee Tee (signed)
> Wong Yuk Hung (signed)

Reading the above letter together with paras 4, 5, 6 and 7 of Mr Teo's affidavit, the instructions are abundantly clear, ie that the parties (plaintiff and defendants) had agreed to settle the action, and that the defendants/applicants wished to have the defence withdrawn and to have judgment entered.

Paragraph 4 of Ho's first affidavit and of Wong's affidavit said that, by the present action, it was the first time that the applicants ever became involved in litigation. This was refuted by the respondent through How's first and third affidavits in which How deposed, which I accept, that the applicants were previously involved in at least one suit, namely, Sibu High Court Suit No 66 of 1984. This goes to the question of reliability of the deponents.

Counsel for the applicants referred to paras 3 and 4 of Ho's first affidavit and submitted that the applicants expected the first defendant company, Kim Leong Timber Sdn Bhd, to pay up the judgment sum and that entry of the judgment would be a mere formality, and that that would enable the first defendant company to settle the claim. It might be true that the applicants expected the first defendant company, being the principal debtor, to settle the claim but on their own admissions, arrangements had to be made to settle the plaintiff's claim. And, with respect, I am unable to accept that the two paragraphs of the said affidavit totally exclude the applicants' liability to pay. Paragraph 3 thereof said: '... that *particularly* Kim Leong Timber Sdn Bhd would be permitted to

settle the plaintiff's claim gradually.' (Emphasis added.) In para 5 of Ho's first affidavit, there is also admission of agreeing to submit to judgment 'so as to give way to a settlement out of court'.

On the other hand, How by his second affidavit denied that there had been fraudulent inducement or mistake and said the second, fifth and sixth defendants conceded in his office that they had no defence to the action and admitted liability.

In para 8 of Ho's first affidavit and of Wong's affidavit, they contended that it was only subsequently when the plaintiff Sungei Way commenced execution proceedings against them that it became clear to them the submission to judgment involved themselves being held personally liable. But taking the representation of How, as alleged by the applicants themselves, How did not at any time say that by submission to judgment they (the applicants) would not be personally liable. In other words, even in the second defendant's own allegation about How's representation, he did not allege How to have said that. On the evidence available, How's representations were merely that arrangements would be made to settle Sungei Way's claim without in any way spelling out the mode or manner of settlement.

I have no hesitation in rejecting the assertion of the applicants that they did not appreciate that by submitting to judgment it involved judgment being entered against them personally.

In para 4 of Ho's second affidavit made on behalf of the third, fifth and sixth defendants, he referred to 'an action' commenced by Sungei Way. He alleged 'the practice' of the plaintiff in getting judgment against them. This he relied on two factors. First, he said they went to see William Lau of Lau & Co, advocates for the plaintiff, who advised them that entering of judgment was a formality and they permitted judgment to be entered by default. Ho annexed exh 'D1'. It is clear from exh 'D1' and from William Lau's affidavit made on 20 February 1989 that all those matters related to Civil Suit No 66 of 1984. As such, they are therefore irrelevant to the present suit. As to the allegation against William Lau, William Lau in his affidavit said, which I have no reason to disbelieve, that he told them to consult their own lawyer. Moreover, this related to Suit No 66 of 1984.

The other factor relied on is exh 'D1' in which Sungei Way said 'the judgment will automatically lapse upon the updating of the account'. Apart from the irrelevancy of exh 'D1' stated above, the element of judgment lapsing through updating of accounts is not, as conceded by counsel for the applicants, a feature of the present case. I reject the allegation of 'the plaintiff's practice in getting judgment' against the applicants as totally unfounded and devoid of any merit.

For the applicants, counsel contended that there was a distinction between 'submit to judgment' and allowing judgment to be entered in terms as in this action. It is, of course, true, as a matter of law, that in the compromise of an action, the forms and methods of compromise or settlement may, among others, be: (1) an agreement to enter judgment by consent, or (2) an agreement for the defendant to submit to judgment.

Having considered the evidence and the materials available, I am convinced that in the instant case the parties to the action, ie the plaintiff and the defendants, had not only agreed to submit to judgment but also to have the consent judgment entered. On the applicants' own letter exh 'TCL 1' they wished to withdraw the defence and to submit to judgment. The sole claim in the statement of claim in this action was for the sum $2,306,108.70, interest and costs. Moreover, when the consent judgment was entered at the hearing on 29 July 1985, Mr Teo, who was counsel for the defendants and who had been instructed on the matter, did not in any way express or indicate that that was not the judgment intended. And, it was not until April 1986 (some nine months later) that fresh action was commenced claiming to set aside the consent judgment. Also, the allegations of the applicants (other than the fourth defendant who as stated earlier made no affidavit and on whose behalf no affidavit was made) that the consent judgment was entered as a result of the negligent, wilful or fraudulent misrepresentations of How Pak Kong were denied by How in his affidavits. Furthermore, in para 4 of How's second affidavit, How deposed that the second, fifth and sixth defendants approached him in his office and admitted to him that they had no defence to the action and admitted liability. None of the three applicants specifically challenged this point. There was also no specific challenge by any of the defendants/applicants respecting the deposition in para 7 of How's second affidavit that after the consent judgment was entered, the applicants again went to him requesting the plaintiff, Sungei Way, to defer the execution on the judgment to which How agreed subject to certain conditions which were not fulfilled.

For the applicants, reference was made to para 10 of Ho's first affidavit in that the intended lessee of the Caterpillar tractors, logging trucks and equipment was not the first defendant company but one Grand Lumber Sdn Bhd for which the applicants 'were supposedly to be guarantors' and that the plaintiff, Sungei Way, had changed the lessee to the first defendant company without their consent. (See also para 10 of Wong's affidavit raising the same point.) With respect, I reject the contention. The first defendant did not dispute that it had entered into the lease agreements. And, as submitted on behalf of the respondent which I accept, the applicants in para 5 of the defence admitted the guarantee but only denied liability

thereunder by denying default in payment or breach on the part of the first defendant.

Paragraph 5 of the defence reads:

> The second, third, fourth, fifth and sixth defendants admit the guarantee referred to in para 7 of the statement of claim, but say that the first defendant (the principal debtor) has not made default in the payment of the agreed rentals or has not committed the alleged breaches of contract with the plaintiffs and the first defendant promised to continue to pay the agreed rentals to the plaintiffs regularly and punctually, by reason whereof, the second, third, fourth, fifth and sixth defendants are under no liability to the plaintiffs under the said guarantee at this stage.

In this connection, I also find no merits in the contention of counsel for the applicants that the said para 5 was what he termed 'limited admission'. To my mind, the applicants, on the materials available, were clearly guarantors for the lease agreements entered between the plaintiff and the first defendant-company.

For the applicants it was also pointed out that they had instituted an action (Suit No 64 of 1986) seeking to set aside the consent judgment herein and that unless stay was granted it would be futile to proceed with the action. A stay of execution of a judgment for payment of money will not ordinarily be granted simply on the ground that the defendants/applicants have brought an action to set aside the judgment, at any rate not in the absence of special circumstances rendering it inexpedient to enforce the judgment, though the bringing of the action is, of course, a factor to be considered together with other relevant facts and circumstances that are properly placed before the court. In *Ferdinand Wagner* v *Laubscher Brothers & Co*[1] the plaintiff, a manufacturer in Germany, on 5 October 1961, obtained a judgment against the defendants, its distributors in England for about £6,000. That judgment was subsequently confirmed by the higher courts in Germany. In 1964, the defendants brought an action in England raising substantially the same issues. In August 1969, the German judgment was registered in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933. The effect of such registration was that the German judgment was equivalent to and enforceable just as if it was an English judgment. The defendants applied and obtained a stay of execution on the judgment. However, on appeal to the Court of Appeal, the stay was removed. In his judgment Lord Denning said at p 176:

> If the plaintiffs had obtained an English judgment, we should not, for one moment, grant a stay simply because the defendants had brought a cross-claim in another action against the plaintiffs.

I am aware that in our instant case the second action brought by the defendants/applicants was seeking to set aside the consent judgment whereas in *Ferdinand Wagner*'s case[1] the action was instituted to relitigate in England a number of issues all or almost all of which had been the subject of litigation in Germany. But the distinction, in my opinion, does not affect application of the principle. In other words, whether the action is to relitigate issues already decided or to set aside a consent judgment, the fact that such an action has been brought is, in itself, no ground for granting a stay of execution of the judgment, at any rate not in the absence of special circumstances rendering it inexpedient to enforce the judgment.

It may be convenient to state here that in the course of her submission, counsel for the respondent referred to principles relating to the grant of interlocutory injunction. The present application is for stay of execution on a judgment. In my opinion, different tests and considerations apply.

I have considered the submissions by counsel and the affidavits and materials available. My conclusion is that for the purpose of this application, none of the grounds stated in the summons-in-chambers dated 13 September 1988, ie negligence, fraud, negligent or fraudulent inducement or mutual mistake has been shown, even prima facie, to exist. The applicants also fail to show that there are special circumstances rendering it inexpedient to enforce judgment, it being not their case that they are unable from any cause to pay the judgment sum (O 47 r 1(1)). On the other hand, a plaintiff who has properly obtained a judgment ought not to be deprived , generally speaking, of the fruit of his litigation except for good reason. On the evidence and materials available, I am not satisfied that this is a proper case justifying the exercise of the discretion of the court to grant the relief as sought.

The application is dismissed with costs to be paid by the applicants (ie the second, third, fourth, fifth and sixth defendants) to the respondent/plaintiff. In the absence of an agreement, such costs are to be taxed.

Application dismissed.

Solicitors: *Yong & Wong*; *Lau & Co.*

Reported by *PS Ranjan*